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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

JANE M. STROUP, Plaintiff and Appellant, v. CITY OF VICTORVILLE et al., Defendants and Respondents.	E034384 (Super.Ct.No. VCVVS027536) OPINION

APPEAL from the Superior Court of San Bernardino County. Robert E. Law, Judge. (Retired Judge of the Mun. Ct. for the Orange Jud. Dist. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Law Offices of Haddon & Lam, Mark R. Haddon, for Plaintiff and Appellant.

Best Best & Krieger, Howard B. Golds, John D. Higginbotham, for Defendant and Respondent.

Plaintiff Jane Stroup (Stroup) brought an action under the California Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.)[1] for gender discrimination, hostile work environment, harassment based on sex, retaliation for participation in protected activity, and for intentional infliction of emotional distress, against her employer, the City of Victorville (hereafter Victorville), as well as two fellow employees, Guy Patterson (Patterson) and Mike Jenks (Jenks).[2]

The defendants collectively brought a motion for summary judgment which was granted as to all causes of action, and judgment was entered for defendants.

We affirm.

FACTUAL BACKGROUND

Stated most favorably to Stroup, as the opponent of the summary judgment motion (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768), the record shows the following facts.

Stroup began work for Victorville as a Bus Driver I on or about April 12, 1993. Bus drivers work in Victorville's Transit Division, which is part of the city's public works department. During the period which is pertinent to Stroup's complaint, defendant Guy Patterson was the director of Victorville's Public Works Department. Defendant

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[1] All citations herein to statutes refer to the Government Code unless another code is specified.

[2] Victorville is a defendant in each of the five causes of action. It is the sole defendant in the first cause of action (gender discrimination). Patterson is a defendant in the second, fourth and fifth causes of action (hostile work environment, retaliation and

[footnote continued on next page]

Mike Jenks was a supervisor in the fleet maintenance division, a division of the public works department which is separate from the transit division. Peggy Clark, classified as a Bus Driver II, had been responsible for daily operations of the city's Transit Division, apparently under the oversight of Lowell Smith, the Assistant Director of Public Works. Clark was not formally designated a supervisor; the transit division apparently had no such position.

In 1998, Stroup began to work under Clark as a dispatcher, at first on an as-needed basis and later more or less permanently, and assisted Clark by running the office at times when Clark was out of the office. After Clark suffered a stroke in December 2000, Smith assigned Stroup to take over Clark's duties. Beginning in January 2001, she was paid five percent over her base pay as compensation for her extra duties, which were not within the job description of a Bus Driver I.

Over a period of about four years, beginning in 1998 when Stroup first began working as a dispatcher and began having contact with Jenks, Jenks made a number of derogatory comments to Stroup, which Stroup perceived to reflect Jenks's disdain for her as a female. The first incident took place during a meeting in which Stroup, Jenks, Lowell Smith and another employee were discussing a bus. Stroup and Jenks had a disagreement "on something about the bus." Jenks asked Stroup "How old are you

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[footnote continued from previous page]
intentional infliction of emotional distress, respectively). Jenks is a defendant in the second, third (harassment based on sex) and fifth causes of action.

anyway?" Stroup considered the comment demeaning, but said nothing except that it was inappropriate to ask a lady her age.

In another instance, Stroup was in the garage discussing fueling requirements for a particular bus with one of the mechanics. Jenks disagreed with her as to the amount of fuel the bus needed in order to complete its run, and called her "little missy" in front of the mechanic. She responded only that he was mistaken on the fuel issue.

On other occasions, Jenks would demean her in front of her coworkers by a facial expression or a gesture which indicated that she did not know what she was talking about. He would speak to her as though she was a child or not as intelligent as he was. She never saw him use such gestures or expressions toward anyone other than her. He would on a regular basis indicate in some manner his belief in her inferior intelligence or that she did not know what she was talking about. She believed he did so solely because she is female. He also used to call her on the phone and make slurping and loud eating noises while discussing work-related matters. Those conversations took place every couple of weeks.

In March 2002, she and Jenks had a disagreement as to whether a driver needed to be tested for drug use after an accident. The driver was clearly not at fault, but Stroup understood that the rules governing bus drivers required testing if there is any possibility that the accident caused more than $500 in property damage. At the accident scene, Jenks told her that she did not understand what she had been taught about the need for drug testing and that she did not know what she was talking about.

Jenks was not Stroup's supervisor when he asked about her age and when he addressed her as "little missy." However, in about the summer of 2001, Jenks was made the interim supervisor of the transit division, and Stroup was told that he was her supervisor. Thus, he apparently was her supervisor when he disparaged her about the need for drug testing after the March 2002 accident.

After the incident at the bus accident, Stroup requested a meeting with Patterson to discuss the accident and the way Jenks treated her at the accident scene. She and Dan Thomas met with Patterson some time between March 12, the date of the accident, and March 18, 2002. She described Jenks's continual disparagement of her, including the incidents which had happened a couple of years earlier, and said she felt there had to be a change. At the end of the meeting, Patterson said Jenks would be sent to get some training to deal better with employees and would be required to apologize to her.

On March 18, 2002, Stroup filed a written grievance against Jenks, describing all of the incidents but not ascribing any of them to gender bias. On March 22, 2002, Patterson responded that he believed there was a personality conflict between Stroup and Jenks, but that he found "no validity in any of the issues [Stroup had] brought forward." Patterson's response informed Stroup that the decision had been made to make Dan Thomas the "first line contact with all issues regarding the Transit Division" and that she was to report all "correspondence, accident reports, personnel issues, etc." to Thomas, who in turn would be reporting to Jenks. Thereafter, Stroup was relieved of some of the duties she had been performing. She believed it was in retaliation for the grievance.

In support of their motion for summary judgment, defendants submitted a declaration by Patterson stating that when Peggy Clark retired, Dan Thomas was the next in line for her position in terms of seniority. However, both Thomas and Stroup were given some of Clark's leadership responsibilities beginning in July 2001, and they each received additional compensation of five percent of their regular salaries. The decision to promote Dan Thomas was made in January 2002, before Stroup filed her grievance. In his deposition, Patterson testified that the decision was based on Thomas's seniority, the length of time he had been working as a Bus Driver II and his past working relationship with Clark. He felt that Thomas was more qualified for the position than Stroup. Stroup was assigned to assist Thomas, and her classification and duties as a Bus Driver II remained unchanged. She received additional compensation of 7.5 percent over her regular salary for her extra duties, and in May 2002, she received a 5 percent merit pay increase.

DISCUSSION

Standard of Review

On appeal after a motion for summary judgment has been granted, we review the record de novo, considering all the evidence set forth in the moving and opposition papers, except that to which objections have been made and sustained. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334.) We determine with respect to each cause of action whether the moving defendant has conclusively negated a necessary element of the plaintiff's case, or has demonstrated that under no hypothesis is there a material issue of fact which requires determination at trial. (*Ibid.*) If the defendant has met its initial

burden of producing evidence which negates a necessary element or establishes the absence of any material disputed issue of fact, the burden shifts to the plaintiff to produce evidence showing that a triable issue exists as to one or more facts material to the cause of action or defense. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 845.) The moving party's papers are strictly construed, and the opposing party's papers are liberally construed, and the opposing party's version of all disputed facts is treated as correct. All doubts as to the propriety of granting the motion are to be resolved in favor of the party opposing the motion. (*Saelzler v. Advanced Group 400, supra*, 25 Cal.4th at p. 768.)

With respect to a cause of action for employment discrimination, the defendant moving for summary judgment has the burden of producing evidence which shows that its actions were taken for a non-discriminatory reason which is factually unrelated to prohibited bias. (*Guz v. Bechtel National, Inc., supra*, 24 Cal.4th at pp. 354-358, discussing *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 [93 S.Ct. 1817, 36 L.Ed.2d 668].)[3] If the defendant meets this burden, the burden shifts to the plaintiff to produce substantial evidence which rationally supports the inference that the employer's actions were motivated by prohibited bias. (*Id.* at p. 357.) However, evidence which is

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[3] The court did not decide whether, in the context of a motion for summary judgment, the plaintiff bears the initial burden of making a prima facie showing of unlawful discrimination, as is the case at trial. (*Guz v. Bechtel, supra*, 24 Cal.4th at pp. 354-357.) In this case, defendants did not assert in their motion that plaintiff failed to meet an initial burden of making a prima facie showing of prohibited discrimination, and on appeal they concede that "there is no need to become unduly focused on the order of proof" because, they contend, Victorville has satisfied its burden of demonstrating that the action lacks merit by presenting evidence of its non-discriminatory reasons for its actions.

facially sufficient to support an inference that the defendant's actions were motivated by bias is not necessarily sufficient to overcome the defendant's evidence and preclude summary judgment, as where the plaintiff created only a weak issue of fact and there was "abundant and uncontroverted independent evidence that no discrimination had occurred." (*Id.* at pp. 361-362.)

We address the summary judgment motion as to each cause of action separately.

First Cause of Action: Gender Discrimination

Stroup alleged in her first cause of action that she was subjected to various discriminatory and harassing acts by defendant Jenks, as well as differential treatment and terms and conditions of employment, based on her gender, and that she suffered the loss of a promotion and a reduction in salary as a result of Victorville's "ill will and prejudice toward [her] because of [her] gender," in violation of section 12940.[4] Victorville argued in its motion that there was not a "scintilla of admissible evidence that gender discrimination had anything to do with Jenks' [*sic*] allegedly 'disrespectful' attitude toward Stroup, or that any personnel action taken by Patterson and/or [Victorville] was attributable to Stroup's gender."

Jenks's behavior arguably constituted sexual harassment (see discussion below). However, gender discrimination and sexual harassment are distinct concepts and have different elements. Harassment consists of conduct of a type which is not necessary for

[4] Section 12940 prohibits discrimination and harassment in employment on the basis of membership in various protected classes, including gender. (§ 12940, subds. (a), (j)(1).)

the management of the employer's business or performance of a supervisory employee's job. It consists of conduct outside the scope of necessary job performance which is engaged in for personal gratification, because of meanness or bigotry, or for other personal motives. In contrast, gender discrimination arises out of the performance of necessary personnel management duties. (*Reno v. Baird* (1998) 18 Cal.4th 640, 645-647.) It requires proof both that the defendant employer discriminated against the plaintiff with respect to personnel management decisions because of his or her gender and that the plaintiff suffered a loss of tangible job benefits, either with respect to compensation or in terms, conditions or privileges of employment, as a result of gender-related animus. (§ 12940, subd. (a); *Mogilefsky v. Superior Court* (1993) 20 Cal.App.4th 1409, 1413-1414.)

Stroup asserts that as a result of gender discrimination, defendants promoted Thomas rather than her to the supervisory position and effectively demoted her by taking away some of her prior duties and reducing her pay. In his declaration and in his deposition, Patterson states that Thomas was promoted because of his greater seniority, his experience, the length of his service as a Bus Driver II and his past working relationship with the prior Bus Driver II. This is a gender-neutral reason for promoting Thomas rather than Stroup, and the burden shifted to Stroup to produce evidence that the decision resulted from gender-related animus. (*Guz v. Bechtel National, Inc., supra* 24 Cal.4th at p. 357.) However, Stroup produced no evidence that Thomas did not have

greater seniority or was not qualified for the job.[5] On appeal, she does not call our attention to any evidence which supports the inference that Patterson made the decision to promote Thomas out of gender-related animus, or that Jenks's animosity toward her infected Patterson's decision, and our review of the record has disclosed none. Finally, the fact that all of the managers and supervisors in the public works department were male is not sufficient to meet her burden of producing substantial evidence showing that the reasons Patterson gave for promoting Thomas rather than her were a mere pretext. (*Guz v. Bechtel National, Inc., supra*, 24 Cal.4th at p. 357.) Thomas was not made a supervisor, but the "lead worker" or "first line contact" of the transit division. There is no evidence as to the gender distribution of lead workers in the various divisions. However, his predecessor in that position was Peggy Clark, a female.

Patterson also denied that Stroup was demoted and suffered a loss of pay, as she alleged. Rather, she remained a Bus Driver II and continued to perform some of the functions she had previously performed. She continued to receive extra compensation for those duties. Stroup does not deny Patterson's statements in his declaration that she in fact received an increase in the "out of classification" supplemental pay from 5 percent to 7.5 percent and that two months after she filed her grievance she received a 5 percent

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[5] Stroup stated in her declaration that she was "the only employee in the transit division that [*sic*] possess[ed] the qualifications to be a transit supervisor." However, Victorville's objection that her opinion lacked foundation was sustained, and Stroup does not contest the correctness of the court's evidentiary ruling. We therefore do not consider Stroup's assertion as evidence which might support her contentions. (*Guz v. Bechtel National, Inc., supra*, 24 Cal.4th at p. 334.)

merit pay increase. Stroup thus fails to establish a triable issue of fact that she was demoted or lost pay.

Thus, the motion for summary judgment was properly granted as to the first cause of action.

Second and Third Causes of Action: Hostile Work Environment and Harassment Based on Sex

There are two actionable types of sexual harassment: quid pro quo harassment, which conditions a term of employment upon unwelcome sexual advances, and the creation of a hostile work environment. (*Accardi v. Superior Court* (1993) 17 Cal.App.4th 341, 348, declined to follow on other grounds in *Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 816-823.) Stroup's third cause of action is entitled "harassment based upon sex" but she neither alleged nor produced any evidence which would support a cause of action for quid pro quo harassment. Therefore, the court properly granted the summary judgment motion as to the third cause of action.

As to the second cause of action, defendants argue that Stroup failed to meet her burden of producing evidence of a hostile work environment because none of Jenks's comments were sexual in nature or even alluded to Stroup's gender, except for the "little missy" comment. However, creation of a hostile work environment does not require overtly sexual acts or comments, or even any direct reference to the plaintiff's gender. Rather, it occurs when a person is subjected to intimidation or hostility for the purpose of interfering with the person's work performance, where the person's gender is a "substantial factor" in the hostile treatment – i.e., that the harassment would not have

occurred but for the plaintiff's gender. (*Accardi v. Superior Court, supra*, 17 Cal.App.4th at p. 348; *Birschtein v. New United Motor Manufacturing, Inc.* (2001) 92 Cal.App.4th 994, 1001.) The hostility can take many forms, including spreading untrue rumors or making unsubstantiated complaints about the plaintiff's ability to perform her job, making fun of her before her peers or superiors and making derogatory and condescending remarks about her. (*Accardi v. Superior Court, supra*, 17 Cal.App.4th at pp. 346, 348-349.) Thus, the absence of comments which are overtly sexual or which directly reflect hostility based on Stroup's gender is not sufficient to meet defendants' burden of producing evidence that Jenks's behavior was gender-neutral and to shift the burden to Stroup. (*Guz v. Bechtel National, Inc., supra*, 24 Cal.4th at p. 357.) However, defendants also argue that the conduct Stroup described in her declaration and deposition is insufficient as a matter of law to create a hostile work environment. We agree with this contention.

To be actionable, workplace harassment must be sufficiently severe or pervasive to alter the conditions of the plaintiff's employment. The plaintiff must prove that the defendant's conduct would have interfered with a reasonable employee's work performance and would have seriously affected her psychological well-being. She must also prove that the conduct actually interfered with her performance or caused her serious emotional or psychological harm. (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 609-610.) To be sufficiently pervasive, the conduct may not be "occasional, isolated, sporadic or trivial." Rather, the plaintiff must show "a concerted pattern of harassment of a repeated, routine or a generalized nature." (*Id.* at p. 610.)

And, while an employee need not prove any tangible job detriment to establish a sexual harassment claim (§ 12940, subd. (j)(1)), "'the absence of such detriment requires a commensurately higher showing that the sexually harassing conduct was pervasive and destructive of the working environment.' [Citation.]" (*Fisher v. San Pedro Peninsula Hospital, supra*, at p. 610.)

Even construed most favorably to Stroup, the evidence does not support the conclusion that Jenks's conduct was either severe or pervasive, or that it interfered with Stroup's performance or her job or caused her either any tangible job detriment or psychological or emotional harm. Stroup described three incidents in which Jenks demeaned her in front of coworkers, including her managers, either stating or implying that she did not possess the competence to do her job. She described an unspecified number of instances in which he made loud "eating noises" while discussing work-related issues on the telephone. She stated that there were many other instances in which Jenks would express, by facial expression or other body language, his opinion that she lacked intelligence, did not know her job or was incompetent. She stated that he never treated any other employee in that manner. However, although this conduct took place over a period of three to four years, Stroup did not produce evidence that it interfered with her ability to perform her job or that it caused her any serious psychological harm. And, although Stroup attempts to establish a causal link between Jenks's harassment and her failure to obtain the promotion that ultimately went to Thomas, she produced no evidence which supports such an inference.

Because Stroup produced no evidence of severe or pervasive sexual harassment sufficient to prove the existence of a hostile work environment, the summary judgment motion was properly granted as to the second cause of action.

Fourth Cause of Action: Retaliation

Stroup contends that she lost the promotion to Thomas and suffered a demotion and the loss of pay in retaliation for filing her grievance.

In order to make a prima facie showing of retaliation, the plaintiff must show that she engaged in a protected activity, that the employer subjected her to an adverse employment action, and that a causal link exits between the protected activity and the employer's action. (*Akers v. County of San Diego* (2002) 95 Cal.App.4th 1441, 1453.)

Defendants contend that Stroup did not engage in a protected activity when she filed her grievance because she did not specifically assert in the grievance that Jenks's conduct constituted gender discrimination or sexual harassment in violation of section 12940. However, in interpreting an analogous provision of the federal anti-discrimination law, several of the federal appellate courts have held that under federal law, an employee who opposes employment practices which she reasonably believes are discriminatory is protected from retaliation for complaining about those practices. The employee's belief need not be correct, as long as it is reasonable. (*Trent v. Valley Electric Assn. Inc*. (9th Cir. 1994) 41 F.3d 524, 526 and cases cited therein.)[6] This is true

[6] The United States Supreme Court has acknowledged this interpretation without deciding whether it is correct. (*Clark County School District v. Breeden* (2001) 532 U.S. 268, 270 [121 S.Ct. 1508, 1509, 149 L.Ed.2d 509].)

even if she is not aware at the time she makes her complaint that the offensive employment practice may constitute illegal race or sex discrimination. (*Gifford v. Atchison, Topeka & Santa Fe Railway Co.* (9th Cir. 1982) 685 F.2d 1149, 1156-1157.) Because California's FEHA is analogous to the federal anti-discrimination law, California courts often look to the federal courts in interpreting the FEHA. (*Guz v. Bechtel National, Inc., supra*, 24 Cal.4th at p. 354.) In her deposition, Stroup testified that she believed Jenks's conduct resulted from his hostility toward her as a female. Thus, even if Stroup was incorrect that Jenks's conduct constituted discrimination or harassment, her grievance would have been a protected activity if Stroup's belief was reasonable, even though she did not expressly describe it in terms of harassment or discrimination. (*Gifford v. Atchison, Topeka & Santa Fe Railway Co., supra*, 685 F.2d at pp. 1156-1157.)

We conclude that no reasonable person could have believed that Jenks's conduct amounted to sexual harassment or discrimination. As discussed above, Stroup produced no evidence that Jenks's conduct was sufficiently severe or pervasive to have interfered with a reasonable employee's work performance or to have seriously affected a reasonable employee's psychological well-being, nor any evidence that his conduct actually interfered with her performance or seriously affected her psychological well-being. (*Fisher v. San Pedro Peninsula Hospital, supra*, 214 Cal.App.3d at pp. 609-610.) In the absence of such evidence, no reasonable person could have believed that Jenks's conduct created an actionable hostile work environment. (Cf. *Clark County School District v. Breeden, supra*, 532 U.S. 268, 270 [121 S.Ct. 1508, 1509, 149 L.Ed.2d 509]

[no reasonable person could believe that single incident of inappropriate sexual humor constituted harassment].) Nor did Stroup produce any evidence that she had suffered any loss of tangible job benefits before she filed her grievance, such that a reasonable person could have believed that she had up to that point suffered any gender discrimination. (§ 12940, subd. (a); *Mogilefsky v. Superior Court, supra*, 20 Cal.App.4th at pp. 1413-1414 [cause of action for gender discrimination requires proof of loss of tangible job benefits as a result of gender-based animus].) Thus, Stroup failed to demonstrate that her grievance constituted protected activity, and the summary judgment motion was properly granted as to the fourth cause of action.

Fifth Cause of Action: Intentional Infliction of Emotional Distress

Defendants argue that the Workers' Compensation Act preempts plaintiff's claim, and that the facts she alleged are insufficient as a matter of law to support such a claim in any event.

Stroup's emotional distress claim is based both on the conduct by Jenks which allegedly created a hostile work environment and on the defendants' actions in allegedly retaliating against her for filing her grievance. A claim for intentional infliction of emotional distress which is based on conduct alleged to constitute sexual harassment is not preempted by the Workers' Compensation Act. (*Accardi v. Superior Court, supra*, 17 Cal.App.4th at pp. 347, 353.) Neither is a claim for intentional infliction of emotional distress which is based on retaliation against an employee who objects to an unlawful employment practice. Retaliation against an employee who objects to illegal discrimination or harassment violates a fundamental public policy. (*Maynard v. City of*

San Jose (9th Cir. 1994) 37 F.3d 1396, 1405-1406; *Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, 1095-1097.) A claim for damages arising from a tortious act which implicates such a fundamental public policy is not preempted by the workers' compensation law. (*Maynard v. City of San Jose, supra,* 37 F.3d at pp. 1405-1406 [negligent infliction of emotional distress arising from claim of retaliation]; *Gantt v. Sentry Insurance, supra*, 1 Cal.4th at pp. 1097-1101 [wrongful discharge in retaliation for reporting sexual harassment].)

Nevertheless, Stroup has failed to demonstrate the existence of any triable issue of material fact which would support her claim for intentional infliction of emotional distress. As discussed above, she produced no evidence that Jenks's conduct caused her any emotional distress, nor any that she was retaliated against for engaging in protected activity. Thus, summary judgment was properly granted as to this cause of action as well.

DISPOSITION

The judgment is affirmed. Defendants are awarded costs on appeal.

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/s/McKINSTER
J.

We concur:

/s/HOLLENHORST
Acting P.J.

/s/KING
J.